IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 74

UNITED STATES OF AMERICA,

Petitioner,

vs.

LESLIE SALT CO.,

Respondent.

BRIEF OF RAYONIER INCORPORATED. *AMICUS CURIAE.*

CHESTER ROHRLICH,
Attorney for Rayonier Incorporated,
Amicus Curiae.

LEHMAN, GOLDMARK & ROHRLICH,
20 Pine Street,
New York 5, New York.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 71

UNITED STATES OF AMERICA,

Petitioner,

vs.

LESLIE SALT CO.,

Respondent.

BRIEF OF RAYONIER INCORPORATED, *AMICUS CURIAE*

The affirmance of the decision below (218 F. (2d) 91, aff'g 110 F. Supp. 680) is necessary to and should set at rest the erroneous notion that seems to have crept into certain of the cases to the effect that the taxability of an instrument evidencing a debt under Section 1801 of the Internal Revenue Code of 1939* may depend upon the

* Section 1801, in conjunction with Section 1800, of the Internal Revenue Code of 1939 (53 Stat. 1,195), substantially re-enacted as Sections 4311, 4331 and 4381 of the Internal Revenue Code of 1954, imposed a tax "on all bonds, debentures or certificates of indebtedness issued by any corporation, and all instruments, however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities. * * *."

identity of the lender, more particularly whether the lender is a bank or an insurance company.[2]

Interest of *Amicus Curiae*

The interest of this *amicus curiae* in the case at bar stems from the fact that it borrowed a substantial sum of money from an insurance company, evidencing such loan by its note, in respect of which United States documentary stamps, under Section 1801 of the Internal Revenue Code, were affixed. A claim for the refund of such tax was rejected by the Commissioner of Internal Revenue, but the time within which suit for its recovery may be brought has not yet expired.

---

[2] "The prospective borrower who seeks funds in the amount and under the conditions which we are presently considering usually negotiates with a bank or an insurance company. There is no reason why either type of institution should be considered incapable of receiving, or less likely to receive, a 'note' in return for funds which it supplies. The chronology of appellate decisions in this area of the law has unfortunately led to a presumption against the insurance company which lasted until a denunciation by the United States Court of Appeals for the Ninth Circuit, in December of 1954 (U. S. v. Leslie Salt Co.)." Jensch, Documentary Stamp Taxes: The Twilight Zone of Their Application to Large Corporate Loans, 33 Taxes 605, 613 (August 1955).

Both before and since the decision below certain other courts have also recognized the immateriality of the fact that the lender is an insurance company. In *Allen v. Atlanta Metallic Casket Co.*, 197 F. (2d) 460 (C. A. 5, 1952), affg. [illegible] F. Supp. 404, notes to an insurance company were held non-taxable. In *Motor Finance Corp. v. U. S.*, 54-2 USTC par. [illegible] (D. C. N. J., 1954), app. dis. C. A., 3rd Cir., CCH Fed. Tax Rep. (Supp.) 67,226, *Knudsen Creamery Co. v. U. S.*, 121 F. Supp. 800 (D. C. Cal., 1954), *U. S. v. General Shoe Corp.*, 117 F. Supp. 668 (D. C. Tenn. 1953), no distinction was drawn between notes given to a bank and to an insurance company.

ARGUMENT

The impact of the tax is by the statute unequivocally made dependent upon the nature of the instrument itself. Nothing in the statute justifies making the imposition of the tax upon an instrument dependent on the identity of the lender or its motive in making the loan* or its internal procedures in processing the loan.

Equally without legal significance in this context are the "attitude and need of the borrower". *Niles-Bement-Pond* v. *Fitzpatrick*, 213 F. (2d) 305, 312 (C. A. 2, 1954). Judge Clark's dissenting opinion in the cited case noted that in the earlier decision of the same Court in the *General Motors Acceptance* case (161 F. (2d) 593, cert. den. 332 U. S. 810) these very indicia had been relied on but that their relevance was no longer recognized by the majority in the later case. Surely there is no warrant in the statutory language for making the imposition of the tax dependent upon whether the borrower uses the proceeds of the loan to build a new building, buy inventory or pay a pre-existing debt.

Neither does the statute permit the determination of taxability on the basis of the amount or duration of the loan.** Nor is there any warrant for penalizing new busi-

* "* * * it is apparent that the lender's motive in treating the transaction as loan or investment is not a helpful guide in determining taxability. Under this view the borrower is subject to the tax when the lender 'intends to invest.' But since privately placed loans are generally treated as investments and term loans do not fall within either category, if this distinction is pursued it is conceivable that a term loan note negotiated with the loan department of a bank would be nontaxable though an identical note privately placed with an insurance company would be taxed.". Note, 54 Columbia Law Review 428, 431 (1954).

The measure of taxability proposed by the writer of the cited Note obviously requires Congressional consideration and legislation.

** *Curtis Publishing Co.* v. *Smith*, 124 F. Supp. 508 (E. D. Pa., 1954), aff'd 220 F. (2d) 748 (C. A. 3, 1955); *Niles-Bement-Pond Co.* v. *Fitzpatrick*, *supra*.

ness relationships by making taxability hinge on whether the loan is or is not the first one between the parties.

The tax here under review has been on the books in substantially its present form since at least 1924, and at no time has Congress seen fit to enact as criteria of taxation any of these extraneous elements unfortunately generated, to the confusion of the business world, by several of the judicial opinions purporting to apply Section 1801. The legislative history of the tax contains not only the failure of the Congress to adopt such criteria but also the affirmative repeal in 1924 of the tax theretofore levied on promissory notes.* Until the rendition in 1947 of the *General Motors Acceptance* decision not even the Commissioner of Internal Revenue conceived that corporate notes of the kind here under discussion were subject to tax under Section 1801 (M. T. 32, 1948—2 Cum. Bull. 160). There is no need or justification for judicial legislation.

There is no legally significant difference between a loan by an insurance company and one by a bank. Yet Judge (now Justice) Harlan, in writing the prevailing opinion for the Second Circuit holding that the loan in the *Niles-Bement-Pond* case was not taxable—notwithstanding the decision by the same Court in the *General Motors Acceptance* case—noted as a point of distinction between the two cases that in the later case the loan had been made by a bank and not by an insurance company as in the earlier case. In the case at bar a witness for the taxpayer testified, without contradiction, that "the only fundamental difference between a bank loan and an insurance company note seems to lie in the fact that the insurance companies are in a

* The Revenue Act of 1921 (42 Stat. 227, 305) imposed a stamp tax on "promissory notes, except bank notes issued for circulation" (Tit. XI, Sch. A, subd. 5). The Revenue Act of 1924 (43 Stat. 253, 352, 331) repealed Title XI of the 1921 Act (Section 1100) and imposed the tax on bonds and debentures substantially in the form now before the Court (Tit. VIII, Sch. A, subd. 1).

position to extend longer maturities than can a commercial bank" (R. 63).

It may be that insurance companies in making private loans to corporations are entering into an area of business formerly pre-empted by commercial banks resulting in a deprivation of business to investment bankers and underwriters, but in the American economic system business entities are subject to changes in their activities, and so long as no violation of law is involved it is not within the judicial function to construe statutes in a manner prejudicial to one form of business organization or impede the free play of the competitive process. Thus, Judge Clark, who dissented in the *Niles-Bement-Pond* case, recognized that "the kind of one-sided advantage to bank loans now read into the act" is to be "deplored" (213 F. (2d) at 313).

The discrimination against insurance company loans in this area of the law seems to have been the result of a misguided attempt to distinguish between a "loan" and an "investment". At the outset, it may be observed that even if such distinction could logically and objectively be made, it would be without legal significance because the statute here under consideration does not levy a tax on an "investment" as distinguished from a "loan". Because of the requirements of the Securities Act of 1933 and certain state legislation, which are wholly irrelevant to the tax question here under review, it has become customary for loan agreements, where no public distribution of securities is involved or anticipated, to include a declaration by the lender to the effect that the instrument being acquired by it is "for investment". It would seem that if such declaration and fact have any significance under Section 1801, it is to militate against taxability rather than to support it. Debentures and like corporate securities, sought to be taxed by Section 1801, are ordinarily acquired by the initial purchaser for resale and distribution and not for investment by it. It is difficult to understand how a contrary sig-

nificance can be given to the fact that the lender intends to hold and not to market the instrument. Surely, marketing and marketability are primary aspects of "corporate securities" as generally understood.

Moreover, the entire dichotomy between "loan" and "investment" is a deceptive one. Every lender expects to receive back the amount of the loan plus interest and or a premium for furnishing the monies, and in such sense every loan is an investment. Judge (now Justice) Harlan, in the *Niles-Bement-Pond* case, recognized that "a bank as well as an insurance company in a sense intends to invest when it lends money, whether the transaction be called a loan, a private placement or a public issue" (213 F. (2d) at 314). Rather than classifying the debt instrument in terms of investment, loan, private placement or public issue, Section 1801 requires classification in terms of a promissory note on the one hand or a bond, debenture, certificate of indebtedness, or a corporate security with interest coupons or in registered form on the other.

It does not follow from our argument that a debt instrument escapes taxability merely because the contracting parties have labelled it a "note". But it should be equally evident that under the Congressional mandate judicial determination of taxability must be based on the character and substance of the debt instrument itself and not upon findings as to the motives and intent of the borrower and lender, or the manner in which the loan was initiated or negotiated. It is only because of judicial speculation in respect of such matters that there has seemingly developed in the cases a prejudicial attitude against insurance company loans.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

CHESTER ROHRLICH,
Attorney for Rayonier Incorporated,
Amicus Curiae.

LEHMAN, GOLDMARK & ROHRLICH,
20 Pine Street,
New York 5, New York.